IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

THURSDAY, THE FOURTEENTH DAY OF JULY TWO THOUSAND AND ELEVEN

PRESENT

HON'BLE SRI JUSTICE G.V.SEETHAPATHY

S.A.No.1418 OF 2005 & C.R.P.No.6071 OF 2005

S.A.No.1418 OF 2005

Between:-

Avula Kondaiah (died) per LRs
A.Shakunthalamma and others

…Appellants

A n d

Avula Mallikarjuna Rao

...Respondent

A N D

C.R.P.No.6071 OF 2005

Between**:-**

Avula Mallikarjuna Rao

…Petitioner

A n d

Avula Kondaiah (died) per LRs
A.Shakunthalamma and others

...Respondents

HON'BLE SRI JUSTICE G.V.SEETHAPATHY

S.A.No.1418 OF 2005 & C.R.P.No.6071 OF 2005

COMMON JUDGMENT:

This second appeal is directed against the judgment and
decree dated 12.03.2004 in A.S.No.52 of 1999, on the file of the
III-Additional District Judge (F.T.C), Nellore, wherein the said appeal filed by the respondent herein, was allowed, setting aside the judgment and decree dated 05.02.1999 in O.S.No.3 of 1990, on the file of the Principal Senior Civil Judge, Gudur and directing the defendant to deliver vacant possession of the western side house to the plaintiff within four months and also pay Rs.500/- per month to the plaintiff as damages from 12.10.1989, the date of Ex.A-16 notice for unauthorized occupation of the western portion of the suit house.

2. The respondent herein filed the suit O.S.No.3 of 1990 against Avula Kondaiah, husband of first appellant herein, and father of second appellant, for recovery of possession of western half of the plaint schedule house property and for recovery of damages for
use and occupation at the rate of Rs.500/- per month. According to the plaintiff, the suit property originally belonged to one Avula Venkata Ramanaiah, who was father of the defendant, and grandfather of plaintiff. Venkata Ramanaiah had two wives and defendant was born through the first wife Ranganayakamma and the plaintiff's father Venkatakrishnaiah, through the second wife Krishnamma. According to the plaintiff, Venkata Ramanaiah while in a sound and disposing state of mind had executed a registered Will dated 17.02.1962 bequeathing the plaint schedule house property in two portions, the eastern half in favour of defendant and

western half in favour of second wife Krishnamma with absolute rights. It is stated that the first wife i.e., mother of defendant pre-deceased Venkata Ramanaiah. According to the plaintiff, after the death of Venkata Ramanaiah, Krishnamma came into possession of the property that devolved upon her and she has been living along with her son Venkata Krishnaiah and grandson, the plaintiff. It is also averred that Krishnamma brought up the plaintiff as her own adopted son and out of love and affection she executed a registered Will dated 28.09.1988 in favour of the plaintiff. It is alleged that about 1½ years prior to filing of the suit, the defendant required the front room of the western half of the plaintiff's house for domestic necessity, promising to vacate the same as and when required and in view of the close relationship, the defendant was permitted to have possession of the front room of the plaintiff's house. The plaintiff's grandmother Krishnamma died on 01.06.1989. In July, 1989, the plaintiff asked the defendant to vacate the front room as it was required in connection with his marriage, which was slated for August, 1989. The defendant did not vacate the same. The plaintiff got issued a registered notice dated 12.10.1989 to the defendant. On 19.10.1989, the defendant assured the plaintiff that he would vacate the room after Deepavali. However, the defendant did not vacate and got issued a belated reply notice dated 26.10.1989 making false allegations and denying the Will executed by Krishnamma and even denying the title of Venkata Ramanaiah. Hence, the suit for recovery of possession and for damages for use and occupation.

3. The defendant filed a written statement contending

that the suit property originally belonged to one Avula Venkata Ramanaiah, but the defendant constructed a house even during the life time of his father with his own earnings from medical shop by name ‘Sardar Stores’ and that the defendant has been in exclusive possession and enjoyment of the house and that he perfected his title by adverse possession and also against his father Venkata Ramanaiah. The defendant further alleged that the plaintiff’s father Venkata Krishnaiah defied his father Ramanaiah and his mother Krishnamma and married a woman who was already married to one Ramanaiah and through her gave birth to the plaintiff. He, therefore, alleges that sensing trouble from the plaintiff’s father, Venkata Ramanaiah obtained a registered relinquishment deed from plaintiff’s father.

The defendant pleaded ignorance of the Will dated 17.02.1962 executed by Venkata Ramanaiah bequeathing the suit property to the defendant and second wife Krishnamma and denied the genuineness of the said Will. He further alleges that Krishnamma was having food in ‘putakulla’ house run by Manubolu Subbirami Reddy till three days prior to her death and she was living in a room provided by the defendant with the pension of her husband Venkata Ramanaiah and money given by defendant. The defendant denied execution of any Will dated 28.09.1988 by Krishnamma in favour of plaintiff.

The defendant further denied that he entered upon the front room of the house under the permission of the plaintiff and claimed that he was in possession of the entire house in his own right ever since it was built by him

in 1964. The defendant further alleged that the suit was filed at the instigation of plaintiff's father Venkata Ramanaiah as defendant pressed him for repayment of Rs.85,000/- due to the defendant from Venkata Krishnaiah.

4. On the strength of the above pleadings, the trial Court framed the following issues

i. Whether the Will dated 17.02.1962 said to have been executed by Avula Venkata Ramanaiah is true, valid and binding on the defendant?

ii. Whether the Will dated 28.09.1988 said to have been executed by Avula Krishnamma, in favour of plaintiff is true, valid and binding on the defendant?

iii. Whether the defendant perfected his right to the suit property by adverse possession?

iv. To what relief, if any, the plaintiff is entitled to?

5. During trial, P.Ws.1 to 4 were examined and Exs.A1 to A-17 were marked on behalf of the plaintiff. D.W.1 was examined and Exs.B-1 & B-2 were marked on behalf of the defendant.

6. On a consideration of the evidence available on record, the trial Court held on issue No.1 that the plaintiff failed to prove the Will dated 17.02.1962 and on issue No.2 the trial Court held that the plaintiff failed to prove the Will dated 28.09.1988. Accordingly, the suit was dismissed. Aggrieved by the same, the plaintiff filed appeal in A.S.No.52 of 1999.

7. The first appellate Court framed the following points for consideration:

i. Whether Krishnamma plaintiff's grand mother was given only limited interest in respect of the property in question in

pursuance of Ex.A-1 Will dated 17.02.1962 and if so, Krishnamma testator has no right to bequeath the property in question in favour of the plaintiff under Ex.A-14 registered Will dated 28.09.1988?

ii. Whether in view of Ex.B-1 relinquishment deed executed by plaintiff's father Venkata Ramanaiah in favour of the defendant, the plaintiff has no right to claim over the property in question?

iii. Whether the defendant has perfected his right by adverse possession over the property in question?

iv. Whether the possession of the defendant was unauthorized possession in respect of the property in question and if so the plaintiff is entitled to claim damages from the defendant?

v. Whether this Court interferes warrant to set aside the decree and judgment in O.S.No.3 of 1990 on the file of Subordinate Judge, Gudur dated 03.09.1990?

8. On point No.1, the appellate Court held that the Will Ex.A-1 dated 17.02.1962 executed by A.Venkata Ramanaiah and the Will Ex.A-14 dated 28.09.1988 executed by Krishnamma are true, valid and binding on the defendant. On point No.2, the appellate Court held that Ex.B-1 relinquishment deed dated 20.08.1961 executed by Krishnaiah in favour of his father Venkata Ramanaiah and brother the defendant is not binding on the plaintiff. On point No.3, it was held that the defendant has not perfected his title by adverse possession and he failed to prove the claim of adverse possession. On point No.4, it was held that the possession of the defendant is unauthorized in respect of the property in question and, therefore, he is liable to pay damages for use and occupation at the rate of Rs.500/- per month from the date of Ex.A-16 notice i.e., 26.10.1989. Consequently, on point No.5, it was held that the judgment and decree of the trial Court was liable to be set aside. Accordingly, the appeal

was allowed, setting aside the judgment and decree dated 05.02.1999 passed by the trial Court and directing the defendant to deliver vacant possession of western portion of the house to the plaintiff within four months and also pay damages for use and occupation at the rate of Rs.500/- per month from the date of Ex.A-16 notice. Aggrieved by the same, the defendant filed the present second appeal.

9. The plaintiff filed I.A.No.328 of 2004 under Section 114 CPC seeking review of the judgment dated 12.04.2004 in A.S.No.52 of 1999 to the extent that the appellate Court decreed delivery of vacant possession of the western side house instead of delivery of half share of the suit property on the western side. The defendant filed a counter opposing the application and contending that as he preferred second appeal and the same is pending before this Court, the appellate Court cannot review the decree and judgment in A.S.No.52 of 1999. By order dated 12.10.2004, the learned Additional District Judge dismissed the said petition for review. Assailing the same, the plaintiff filed C.R.P.No.6071 of 2005.

10. As both the matters are interrelated and in between the same parties, they are heard together and are being disposed of by this common judgment.

11. Arguments of the learned counsel for both sides in both the matters are heard. Perused the record.

12. Subsequent to filing of the second appeal, the sole appellant (defendant) died and appellants 2 to 6 were impleaded as the legal representatives of the deceased

as per orders in S.A.M.P.No.12122 of 2004.

13. While admitting the second appeal on 17.11.2005, this Court framed the substantial question of law as to whether the Will, which is disputed, can be said to be proved without examining the attestors thereto. In S.A.M.P.No.12199 of 2004, interim stay of delivery of possession was granted subject to condition that the appellant deposits Rs.50,000/- in the trial Court. Subsequently, on 30.12.2005, interim stay was extended until further orders, subject to further condition that the appellants deposit an amount of Rs.40,000/- over and above the deposit of Rs.50,000/- already made, with permission to the plaintiff to withdraw the same. On 14.02.2006, it is reported that the amounts were deposited and the respondent/plaintiff has already withdrawn the same. Hence, the interim stay granted on 17.11.2005 was made absolute. On 16.04.2008 in S.A.M.P.No.902 of 2008, the appellant was directed to deposit Rs.500/- per month towards damages until further orders. By order dated 13.08.2008, this Court called for findings from the Court of the III-Additional District Judge (F.T.C), Nellore regarding the validity of the Will Ex.A-1 dated 17.02.1962 executed by A.Venkata Ramanaiah by permitting both parties to adduce evidence relating thereto. In pursuance of the said order, the learned III-Additional District Judge (F.T.C), Nellore submitted report dated 05.12.2008 holding that the Will dated 17.02.1962 executed by A.Venkata Ramanaiah which was marked as Ex.A-22 was proved by the plaintiff. As seen from the said report, the original of Ex.A-1 Will was called for from the record of O.S.No.8 of 1992, on the file of the Senior Civil Judge,

Gudur and the same was marked as Ex.A-22 and that plaintiff examined P.Ws.5 to 7 and marked Exs.A-18 to A-30.

14. On appreciation of the evidence available on record and also by referring to Sections 68 to 70 and 73 of the Evidence Act relating to proof of execution of the Will, the learned III-Additional District Judge held that the defendant was in possession of Ex.A-22 Will by 15.07.1988, the date on which he deposited the same in the bank and he acted upon the said Will claiming the entire property and thus he admitted the genuineness of the said Will. It was further held that as the original Will Ex.A-22 was in possession of the defendant and he deposited the same in the bank as surety to his son for a bank loan, which was subject matter of O.S.No.8 of 1992, it can be concluded that the defendant admitted the genuineness of Ex.A-22 Will.

The learned III-Additional District Judge, therefore, recorded a finding to the effect that the plaintiff by preponderance of probabilities proved that Ex.A-22 Will was executed by Avula Venkata Ramanaiah. The appellants/defendants filed objections to the said report to the effect that the Will has not been proved in accordance with law, particularly under Sections 69 and 70 of the Evidence Act. Even in the finding recorded by the learned III-Additional District Judge, it was found that the plaintiff failed to prove the Will-Ex.A-22 in terms of Section 69 of the Evidence Act and they have not filed any documents containing the admitted signatures of A.Venkata Ramanaiah, the executant or G.V.Subramanyam, the

second attestor of Ex.A-22. Both the attestors are admittedly no more. It was also held that Section 70 of the Evidence Act is not helpful to the plaintiff as the defendant or his legal representatives are not parties to Ex.A-22.

15. The learned III-Additional District Judge, therefore, on due consideration of the evidence available on record, particularly
Exs.A-23 to A-30 which were filed in A.S.No.8 of 1992 wherein the first appellant stood as guarantor for the loan taken by his son from the State Bank of India, Gudur and deposited Ex.A-22 Will as his title deed, held that the deceased/1st appellant Kondaiah admitted the genuineness of the said Will-Ex.A-22. When once it is found on evidence that the genuineness of the said Will Ex.A-22 was admitted by the deceased/1st appellant Kondaiah and the same was acted upon by him by claiming title to the property under the very same document and offering the same as a security for the loan incurred by his son from the bank, the subsequent denial of the Will by Kondaiah, who was, in fact, having custody of the said document, is only *mala fide.* The finding of the learned III-Additional District Judge that the genuineness of the Will was, in fact, admitted by Kondaiah and the said fact has been duly proved by the plaintiff, is unassailable. When once it is shown that Kondaiah did, in fact, admit the genuineness of Ex.A-22-Will executed by his father A.Venkata Ramanaiah and acted upon the same, the question of proving the said Will again in the present suit does not arise, as the denial of the said Will by Kondaiah in the present suit, is not *bona fide*.

16. When once it is found that A.Venkata Ramanaiah,

original owner of the suit property executed the Will-Ex.A-22, it follows that under the terms of the Will, the eastern half portion of the house devolved on A.Venkata Ramanaiah's first wife's son Kondaiah, the defendant, and the western half devolved on his second wife Avula Krishnamma with absolute rights.

17. Avula Krishnamma executed a registered Will dated 28.09.1988 in favour of her grandson, the plaintiff and on her death on 01.06.1989, the said Will came into force. The learned Additional District Judge, by the impugned judgment in A.S.No.52 of 1999, rightly held that from the language used in Ex.A-1 Will, it was abundantly clear that the real intention of the executant was to make bequest of the western portion of the house in favour of his grandson's wife Krishnamma absolutely. The plaintiff examined P.W.2, the attestor and P.W.3, the scribe of Ex.A-14 to prove the genuineness of the said document. Based on the evidence available on record, the appellate Court has rightly held that the Will-Ex.A-14 executed by Krishnamma in favour of her grandson, the plaintiff, is duly proved.

18. According to the defendant, the plaintiff's father Venkata Krishnaiah executed a relinquishment deed Ex.B-1 for consideration of Rs.500/- relinquishing his rights in favour of himself and his father. The said relinquishment deed is said to have been executed on 20.08.1961. As seen from Ex.A-22 Will, the property originally belonged to A.Venakta Ramanaiah's maternal granduncle Pusa Kondaiah and he bequeathed the same by a Will dated 02.02.1920 in favour of his daughter Narsamma and on her death it devolved on her

son A.Venkata Ramanaiah as his self-acquired property. When the said property constituted the self-acquired property of A.Venkata Ramanaiah, the question of his son Venkata Ramanaiah having any rights therein by birth so as to relinquish the same does not arise.

The alleged relinquishment by Venkata Ramanaiah under Ex.B-1 dated 20.08.1961 is of no consequence and by virtue of the

Will-Ex.A-1 executed by A.Venkata Ramanaiah in respect of the said property which was his self-acquired property, the eastern half devolved on the 1st appellant defendant Kondaiah, son through first wife and the western half devolved on the second wife Krishnamma. By virtue of the Will Ex.A-14 executed by Krishnamma, which is duly proved, the western half of the house devolved on her grandson Mallikarjun Rao, the plaintiff. It is not disputed that the defendants have been in occupation of the western half of the house also.

Though the defendant raised a plea of acquiring title by adverse possession also, the same remains unsubstantiated. The trial Court also held on issue No.3 that defendant failed to prove that he perfected his title to the property by adverse possession and the appellate Court also recorded a concurrent finding on point No.3 to the same effect. The said concurrent findings recorded by the Courts below do not call for any interference.

19. The plaintiff got issued a notice under Ex.A-16 calling upon the defendant to vacate and deliver possession for which the defendant gave a reply under Ex.A-17. As the plaintiff is held entitled for the western half of the suit property and the defendant is found to be in

unauthorized possession of the same, the plaintiff is entitled for recovery of possession and also for damages for use and occupation. The impugned judgment of the appellate Court directing the defendant to deliver vacant possession of the same and also to pay Rs.500/- per month towards damages for use and occupation from the date of Ex.A-16 notice, does not call for any interference.

20. In the result, the second appeal is dismissed, and the civil revision petition is dismissed as having become infructuous. There shall be no order as to costs.

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G.V.SEETHAPATHY, J

14th July 2011

Lrkm.